**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

DIAMALYNN ARNOLD, an individual
resident of the State of Michigan

Plaintiff,

vs.

Case No. 4:07-CV-10209
Hon. Stephen Murphy III

TORIANO TREADWELL and ANTHONY
THOMAS d/b/a PHENOMENON PRODUCTIONS,
at al.

Defendants.

______________________________________/

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DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

NOW COMES Defendants Toriano Treadwell and Anthony Thomas, doing business as Phenomenon Productions, through its undersigned counsel, move for Summary Judgment of Plaintiffs' claims pursuant to *Fed.R.Civ.P. 56(c).* In support of their Motion, Defendants rely upon the attached Brief in Support of their Motion for Summary Judgment and upon the pleadings on file with this Court.

WHEREFORE, Defendants respectfully request that the Court grant their Motion for Summary Judgment in its entirety and enter a judgment in their favor.

Respectfully submitted,

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Dated: October 14, 2008

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BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF ISSUES PRESENTED

I. Are Defendants entitled to judgment as a matter of law where, even if viewed in the light most favorable to Plaintiff, Plaintiff cannot establish a prima facie case for unlawful competition under the Lanham Act because: 1) Plaintiff is not a public figure or celebrity; 2) Plaintiff cannot show false endorsement where Plaintiff granted Defendants permission to use her image in connection with Defendants' business; and 3) Plaintiff's image was used in an artistic medium protected by the First Amendment and there is no explicit misleading language regarding origin?

Defendants say: "Yes"

CONTROLLING AUTHORITIES

Cases

Celotex Corp. v. Catrett, 477 U.S. 317 (1986)

ETW Corp. v. Jireh Publishing, Inc., 332 F.3d 915 (6th Cir. 2003)

Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619 (6th Cir. 2000)

Parks v. LaFace Records, 329 F.3d 437 (6th Cir. 2003)

Rogers v. Grimaldi, 875 F.2d 994 (2nd Cir. 1989)

Statutes

15 USC § 1125(a)(1)(A)

Court Rules

Fed.R.Civ. P. 56(c)

I. INTRODUCTION

The undisputed facts in this case demonstrate that Plaintiff willingly posed for hundreds of sexually suggestive photographs taken by Defendants Toriano Treadwell and Anthony Thomas (herein after as "Phenomenon") free of charge, during 2002-2003. According to Plaintiff, the parties had an express contract which permitted Phenomenon to post Plaintiff's digital photographs on a publicly available internet photography website, eyecandymodeling.com (herein after "Eyecandy website"), owned and operated by Phenomenon. It is undisputed that Plaintiff is neither a celebrity nor a public figure and that Plaintiff's pictures were posted for the sole purpose of aiding her speculative modeling career. After Plaintiff advised Phenomenon that she wanted national modeling exposure, a single photograph of Plaintiff was distributed to Co-Defendant Don Diva for a single publication in Don Diva magazine. Plaintiff's photograph appeared in a pictorial section of the magazine that was attributed to a photography collection of Phenomenon. This sole publication was not used in connection with the sale of any commercial product, but rather was an artistic demonstration of Phenomenon's photography. Moreover, Phenomenon received no compensation or benefit whatsoever as a result of this publication. Photographs of Plaintiff also appeared on a second website, atamodels.net (herein after "ATA website") which is a free access website. Further, Plaintiff's photograph was not used to specifically endorse the sale of any commercial product, owned and operated by Phenomenon and which showcased the photography of Phenomenon.

Three years after the publication of the magazine and posting of the photograph on the internet, Plaintiff filed suit alleging that the unauthorized use of her image in Don Diva magazine and the posting of her image on the ATA website violates Section 43(a) of the Lanham Act for Unfair Competition.

II. STATEMENT OF FACTS

A. The Parties' Underlying History

1. The Photography Sessions and the Contract

In 2002, Plaintiff contacted Phenomenon, a photography company with hundreds of featured models, to take pictures of her in an effort to advance her modeling career. *See* Deposition of Toriano Treadwell (Treadwell Dep.) pp. 11 and 20, attached as Exhibit 1. Phenomenon took pictures of Plaintiff during a series of three photography sessions during the summer of 2002, winter of 2002 and summer of 2003, respectively, in and around the city of Detroit. *See* Affidavit of Diamalynn Arnold (Arnold Affidavit) at ¶ 4, attached as Exhibit 2. At these sessions, Plaintiff willingly posed for a series of sexually suggestive photographs in an effort to "build [her] modeling portfolio and to advance [her] modeling career." Ex. 2, Arnold Affidavit at ¶ 4; *see,* Plaintiff's EyeCandy Profile Photos, attached as Exhibit 3; *see* Additional Photos of Plaintiff taken by Phenomenon, attached as Exhibit 4.[1] Phenomenon took hundreds of photographs of Plaintiff at her request, and provided her with CDs containing copies of each photograph. Deposition of Plaintiff (Plaintiff Dep.) at p. 74, attached at Exhibit 5. Plaintiff did not pay for the CDs and did not pay Phenomenon for the time they spent photographing her. *See* Ex. 5, Plaintiff Dep. at pp. 75-76. Phenomenon retained the original photographs. Affidavit of Anthony Thomas, (Thomas Affidavit) ¶ 4, attached as Exhibit 6. Each photograph, including the photographs given to Plaintiff, contains an EyeCandyModeling.com logo and the website URL indicating the location of the photographs on the internet. Affidavit of Toriano Treadwell, (Treadwell Affidavit), ¶ 4, attached as Exhibit 7; and Deposition of Anthony Thomas (Thomas Dep.) at p. 9, attached at Exhibit 8.

---

[1] Although Plaintiff contends that her photographs are "non-sexually explicit," the photographs speak for themselves.

It is also undisputed that Plaintiff and Phenomenon entered into an express verbal contract in which Phenomenon did not charge for the photography session and provided copies of the photographs to the Plaintiff and that Plaintiff agreed for Phenomenon to post her photographs on their website.[2] *See* Ex. 2, Arnold Affidavit, ¶ 4. Plaintiff further contends that she had the sole authority to decide which pictures were posted on the website and admits that she approved of the pictures posted there. Ex. 2, Plaintiff Dep. at p. 81.

2. The Publication of Plaintiff's Photographs

Plaintiff consented to having her photographs publicly available on the internet in connection with the photography of Phenomenon. Ex. 2, Arnold Affidavit at ¶ 5. Phenomenon displayed Plaintiff's photographs on both the Eyecandy and ATA websites. Ex. 5, Treadwell Affidavit ¶ 6; Ex. 8, Thomas Affidavit ¶ 6. The Eyecandy website provides free access for internet users to view select models' profiles with a limited array of photographs and charges a membership fee to grant access to users to view the Eyecandy website's galleries, containing thousands of pictures of various models. Ex. 1, Treadwell Dep. at pp. 25-26. The ATA website is a free website that exclusively displays photographs of Phenomenon and that does not charge internet users any membership fees. Ex. 1, Treadwell Dep. at pp. 25-26. Thus, Phenomenon was not selling any specific photograph or commercial product on the ATA website, rather the website was an alternative medium for Phenomenon to exhibit its photography. Moreover, it is undisputed that Plaintiff willingly agreed to pose for photographs by Phenomenon and allowed

[2] Phenomenon contends that Plaintiff also agreed to a written contract providing that in exchange for the taking of her photographs, Plaintiff released all rights to the photographs and all liability related to the distribution and dissemination of the photographs. Ex. 1, Treadwell Dep. at p. 15. Indeed, it has been Phenomenon's normal business practice since 2001 to have all individuals they photograph sign a written release. *Id.* at p. 20. Phenomenon is in possession of numerous written release agreements from models that are dated contemporaneously with Plaintiff's photography sessions, but despite reasonable and duly diligent search efforts, has been unable to located the specific released signed by Plaintiff.

Phenomenon to post photographs of her image, specifically attributed to the works of Phenomenon, on the internet. The manner and nature of Plaintiff's image on the ATA website, which Plaintiff contends is a purported endorsement of Phenomenon, is similar to the manner and nature of Plaintiff's image posted on the Eyecandy website.

Subsequent to the posting of Plaintiff's pictures on the internet, Plaintiff suggested to Phenomenon that she wanted National modeling exposure. Ex. 1, Treadwell Dep. at p. 16. At about this time, Phenomenon was approached by Don Diva magazine, which was searching for photographs to use as a pictorial in their magazine. Ex. 5, Treadwell Affidavit at ¶ 6. In 2003, Phenomenon gave Don Diva a single picture of Plaintiff, along with the pictures of other female models, for the publication of a model pictorial. *Id*. These pictures were ultimately published in Don Diva magazine in 2004. Ex. 2, Arnold Affidavit at ¶ 8; *see also* Plaintiff's Photo Appearing in Don Diva, attached as Exhibit 9. Plaintiff's single picture was published within a pictorial series of six photographs in the magazine. At the outset of pictorial, the magazine attributes the photography to Phenomenon by explicitly stating "Photography by: Tori Treadwell and Anthony Thomas for Phenomenon Productions." *See* Pictorial Photographs, attached as Exhibit 10. There was no wording or statement anywhere on Plaintiff's photograph to imply that Plaintiff endorsed Don Diva or that Plaintiff was advertising the sale of any specific commercial product. While Plaintiff's photograph was published with the phrase "Try to Concentrate" appearing on the corner of the photo, such wording was added by Don Diva, not by Phenomenon. It is further undisputed that Phenomenon did not give Don Diva permission to use Plaintiff's photograph for the purpose of advertising. Ex. 7, Treadwell Affidavit at ¶ 8.

Don Diva did not pay Phenomenon for the use of Plaintiff's photograph. Ex. 7, Treadwell Affidavit at ¶ 6. Moreover, Phenomenon did not receive or expect to receive any future compensation or any other benefit from Don Diva as a result of the publication of Plaintiff's picture in the magazine. Ex. 7, Treadwell Affidavit at ¶ 6. Rather, Phenomenon gave Don Diva the single photograph of Plaintiff to help Plaintiff build her portfolio.

> Q. He [Don Diva publisher] wanted you to supply him with the photographs of models?
>
> A. For Eyecandy to do a pictorial, a model pictorial in Don Diva.
>
> Q. And what would Phenomenon get in return?
>
> A. We wouldn't get anything, but the girls would get national exposure.
>
> Q. How would Phenomenon benefit from it if these girls got national exposure?
>
> A. We wouldn't.

Ex. 1, Treadwell Dep. at pp. 22-24; *see also* Ex. 8, Thomas Dep. at p. 29.

3. Plaintiff's Modeling "Career"

Plaintiff maintains that she possesses a protectable interest in her image as a model, and asserted that she worked for three modeling agencies over the years. *See* Plaintiff's Complaint, attached as Exhibit 11, at ¶ 21; and Ex. 5, Plaintiff Dep. at p. 23. However, Plaintiff's own testimony revealed that she is hardly a serious model and that she has not sincerely pursued a modeling career as asserted in her Complaint. Ex. 11, Complaint at ¶ ¶ 9, 18, and 21.

Plaintiff worked with Promotional United from 2004 to 2005. Ex. 5, Plaintiff Dep. at p. 24. During the entire year Plaintiff allegedly worked for Promotional United, she had contact with only one person, whose name she does not remember. Ex. 5, Plaintiff Dep. at p. 25. In addition to being unable to remember the name of her only contact, Plaintiff also could not recall the number of modeling jobs she had while working for Promotional United and what she did at any of those jobs (with the exception of one). Ex. 5, Plaintiff Dep. at p. 27. As to the one job she could remember, Plaintiff was unable to identify where the job took place, what she did, and whether pictures were taken of her. Ex. 5, Plaintiff Dep. at pp. 28-31.

Plaintiff's recollection of the second alleged modeling agency was even worse. She could not remember when she worked there, the jobs she had (if any), what she did, whether pictures were taken of her, or even the name of the alleged agency. Ex. 5, Plaintiff Dep. at pp. 43-47. Indeed, after Plaintiff claimed to have been a model for a "couple of years," she could only identify a single "modeling" appointment that ever resulted from this agency, which was simply passing out fliers. Ex. 5, Plaintiff Dep. at pp. 32-34. As to the third alleged modeling agency, Plaintiff eventually admitted that this job/affiliation did not exist. Ex. 5, Plaintiff Dep. at p. 45.

From Plaintiff's own testimony, it is apparent that the only consistent alleged "modeling" work Plaintiff has procured over the past few years is not even a modeling job at all, but rather a three year career as a topless erotic dancer at Trumps which she attempted to pass off as "modeling", "customer relations" and "modeling/entertainment" with a "talent agency":

Q. Where are you currently employed?

A. With a talent agency.

* * *

Q. What is the name of that talent agency?

A. GW Talent.

Q. What is your position at GW Talent?

A. Customer relations.

Q. And are you part time or full time?

A. Full time.

Q. And what are your job duties for customer relations?

A. Modeling.

* * *

Q. And what have you modeled for? Like, for example, have you modeled products, or do they just simply take pictures of you?

A. No.

Q. Tell me what the modeling job entails.

A. Entertainment.

Q. What exactly do you do, though?

A. Exotic dancing.
Q. You are an exotic dancer at Trumps?
A. Yes.

Ex. 5, Plaintiff Dep. at pp. 49-51. In fact, Plaintiff has entered into contracts with at least three strip clubs and is still pursuing her stripping career full-time. *See* Plaintiff's Contracts with Strip Clubs, attached at Exhibit 12.

Based upon the factual background of Plaintiff's alleged modeling career, Plaintiff's contentions that Plaintiff seeks to "protect her reputation for high quality professional modeling" is disingenuous and misleading. See Ex 9, Complaint at ¶ 25. The facts do not support any implication that Plaintiff has a "reputation for high quality professional modeling" or that she was ever employed in such a capacity; rather, Plaintiff maintained a career as a topless dancer dancing under a fake name. Despite the mere allegations in Plaintiff's Complaint that Phenomenon's use of her image "has deceived fans and prospective modeling agencies," Plaintiff is unable to identify any modeling agencies that viewed the alleged unauthorized use of Plaintiff's image or that any modeling agency were deceived in any way. Ex. 6, Arnold Dep. at pp. 133. Further, Plaintiff was only able to identify two people who were allegedly "deceived" as a result viewing the her image on the ATA website or the Don Diva publication: Plaintiff's own sister and a customer from the strip club where Plaintiff is employed (who Plaintiff can identify by first name only). Ex. 6, Arnold Dep. at pp. 134-136. Moreover, Plaintiff's own testimony undermines her unsupported assertions that her "fans" have been deceived and establishes that such claims are frivolous, given that Plaintiff has admitted that she does not have any fans.

Q: Do you currently have any fans?
A: I'm sorry?
Q: Like a fan. I am a huge Tigers' fan. Do you have any Diamalynn Arnold fans, like we like Diamalynn Arnold?

A: I am not sure. No.

Q: I'm sorry?

A: No.

See Ex 9 Complaint at ¶¶ 23, 24; and Ex. 6, Arnold Dep. at pp. 132-133.

III. ARGUMENT

A. Standard of Review

Summary judgment is appropriate only when there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Fed.R.Civ. P. 56(c).* Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to the party's case and on which that party bears the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex,* 477 U.S. at 323. Once the moving party meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). In evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970). The non-moving party may not rest upon its mere allegations, however, but rather "must set forth specific facts showing that there is a genuine issue for trial." *Fed.R.Civ. P. 56(e).* The mere existence of a scintilla of evidence in support of the non-moving party's position will not suffice.

B. Plaintiff's Claim Under the Lanham Act is Insufficient as a Matter of Law

Plaintiff's claim for unfair competition is founded on § 43(a) of the Lanham Act. While Plaintiff's Complaint is vague as it which aspect of the Lanham Act is at issue, it appears from the proceedings to date that Plaintiff is seeking recovery under 15 USC § 1125(a)(1)(A) for false association or endorsement.

A false designation of origin claim brought under § 43(a) of the Lanham Act is the equivalent of a claim for false association or endorsement, and the "mark" at issue is the plaintiff's identity. *Landham v. Lewis Galoob Toys, Inc.,* 227 F.3d 619, 626 (6th Cir. 2000); *see also Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir. 1992). When the First Amendment is evoked, as it is here, the Sixth Circuit has adopted the test set forth in *Rogers v. Grimaldi,* 875 F.2d 994 (2nd Cir. 1989), which establishes that "the Lanham Act should be applied to artistic works only where the public interest in avoiding confusion outweighs the public interest in free expression. [T]he public interest in free expression should prevail if the use of the celebrity's image has artistic relevance, unless it is used in such a way that it explicitly misleads as to the source of the work." *ETW Corp. v. Jireh Publishing, Inc*. 332 F.3d 915, 928 (6th Cir. 2003), *citing Parks v. LaFace Records,* 329 F.3d 437, 451-52 (6th Cir. 2003).

Thus in order for Plaintiff to establish a prima facie claim for a false designation of origin when the use of the image is within a medium subject to First Amendment protection, as is the case here, Plaintiff must present evidence demonstrating that: 1) Plaintiff has a protectable interest in her image such as a celebrity or public figure; 2) Phenomenon's use of her image is a false designation of origin, false or misleading description of fact, or false or misleading representation of fact that is deceptive as to Plaintiff's affiliation, connection, or association to Phenomenon; and 3) Phenomenon's use of the photographs had no artistic relevance or that Phenomenon's use of Plaintiff's image explicitly misleads as to the source of the work of such person with another person. Plaintiff is unable to satisfy her burden. Accordingly, Defendants' Motion for Summary Judgment should be granted.

1. Plaintiff is Not a Celebrity and Does not Maintain a Pecuniary Interest in Her Image

a) Because Plaintiff is Not a Celebrity or Public Figure, Use of her Image is not Actionable Under the Lanham Act

As a general rule, the image and likeness of an average person, i.e. a non-celebrity such as the Plaintiff in this case, cannot function as a trademark and thus receives no protection under the Lanham Act. *ETW Corp.*, 332 F.3d at 922. Celebrities, on the other hand, may have a protectiable interest in their image and/or likeness because they are in an exceptional position of having a considerable investment in their own unique, positive public image. *Allen v. Nat'l Video, Inc.*, 610 F.Supp. 612, 625 (S.D.N.Y. 1985) (the court found that there was no dispute that plaintiff's name and likeness were well-known to the public, and that he had built up a considerable investment in his unique, positive public image); *and Ives Laboratories, Inc. v. Darby Drug Co., Inc.*, 601 F.2d 631, 641-42 (2d Cir. 1979) ("Application of the act is limited, however, to potential deception which threatens economic interests analogous to those protected by trademark law.") Thus, § 43(a) of the Lanham Act permits celebrities to vindicate property rights in their identities against allegedly misleading commercial use. *Parks*, 329 F.3d at 445; *see also Waits*, 978 F.2d at 1110 (celebrity suit against snack manufacturer for unauthorized use of his distinctive voice in a commercial; and *Allen*, 610 F.Supp. 624-25 (S.D.N.Y. 1985) (celebrity suit against a video retailer for use of a celebrity look-alike in its advertisements). A celebrity is someone who is "a celebrated or widely known person: one popularly honored for some signal achievement." *Parks*, 329 F.3d at fn. 3.

The Lanham Act's provisions are exclusive to identities of celebrities and public figures because a "celebrity has a similar commercial investment in the 'drawing power' of his or her name and face in endorsing products and in marketing a career." *Allen*, 610 F.Supp. at 625. Thus, celebrities have standing to sue under § 43(a) because they possess an economic interest in their identities akin to that of a traditional trademark holder.[3] *Parks*, 329 F.3d at 445-446; *Landham*, 227 F.3d at 626; *Waits*, 978 F.2d at 1110; and *Allen*, 610 F.Supp. at 624-25.

Here, Plaintiff cannot establish that she is a celebrity or that she has a protectable interest in her identity. Plaintiff has not offered even a scintilla of evidence that she is a well-known or considered to be a public figure, much less a celebrity. While Plaintiff's Complaint disingenuously alleges she has "fans" and a "reputation for high quality professional modeling," Plaintiff admitted that she did not have any "fans" and was unable to identify a single instance where she acted as a "high quality professional" model. Rather, Plaintiff testified that she has had virtually no modeling career, and instead has maintained a career as a topless dancer for the past several years. Further, Plaintiff has no evidence that she has a protectible interest in her identity or that a merchant would receive any sort of commercial benefit from the use of Plaintiff's image as a result of her alleged celebrity status. Plaintiff has also failed demonstrate that Phenomenon obtained any commercial advantage as a result of their association with Plaintiff's image. As such, Plaintiff has failed to establish that she possesses an unique, positive public image or a commercial magnetism in her image that would warrant protection under the Lanham Act. Because Plaintiff has failed to meet this threshold element, Phenomenon's Motion for Summary Judgment should be granted and Plaintiff's Complaint should be dismissed.

b) The State Court's Determination that Plaintiff Failed to Demonstrate Value in Her Image Constitutes *Res Judicata*

Plaintiff's state court actions involved the very same nucleus of facts and the same discovery predicating her Federal Lanham Act claim. Specifically, in the state action, Plaintiff alleged that Phenomenon's use of her image in both the Don Diva publication and on the ATA website amounted to a misappropriation invasion of privacy. The Oakland County Circuit Court properly granted Phenomenon summary disposition and held that Plaintiff did not have sufficient evidence to support a claim of misappropriation of likeness as "Plaintiff has failed to present evidence her image has any value." *See* December 20, 2007 Order attached at Exhibit 13, at p. 4. Although Plaintiff has appealed this ruling, Plaintiff asserts that Michigan law does not require a showing of pecuniary value for misappropriation.

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[3] Despite extensive research, no case law was located to support a cause of action under the Lanham Act in the absence of a finding that the plaintiff was a celebrity or public figure.

This finding by the Oakland County Circuit Court on summary disposition operates as *res judicata*. *See Gursten v Kenney*, 375 Mich. 330, 333-334, 134 N.W.2d 764 (1965) (the fact that a judgment is entered before a case proceeds to trial does not undermine the *res judicata* effect of the judgment). "The doctrine of *res judicata* provides that, where two parties have fully litigated a particular claim and a final judgment has resulted, the claim may not be re-litigated." *VanDeventer v. Michigan National Bank*, 172 Mich.App. 456, 463, 432 N.W.2d 338 (1988), *lv. app. den.*, 432 Mich. 907.

Res judicata is designed to carry out the public policy of avoiding repetitious litigation. *Jones v. Chambers*, 353 Mich. 674, 681, 91 N.W.2d 889 (1958). For a judgment in a prior action to bar the re-litigation of a claim in a subsequent action, three prerequisites must be satisfied: (1) the first action must have been decided on the merits; (2) both actions must involve the same parties or their privies; and (3) the same matter contested in the second action was or could have been resolved in the first action. *Bd of County Road Commissioners for the County of Eaton v. Schultz*, 205 Mich.App. 371, 375-376, 521 N.W.2d 847 (1994); *Gose v. Monroe Auto Equipment*, 409 Mich. 147, 159, 294 N.W.2d 165 (1980). Without a doubt, these prerequisites are satisfied regarding Plaintiff's failure to prove value in her image. Whether Plaintiff had value in her image was argued on summary disposition after consideration on the merits and the parties are the same in both the state and Federal action.

Further, the determination made by the state trial court in the underlying state claim that Plaintiff's image did not have value was based upon the very same facts that this Court must consider in its determination as to whether Plaintiff has a protectible interest in her image under the Lanham Act. Indeed, the Sixth Circuit has held that a Lanham Act false endorsement claim is the federal equivalent of the right of publicity. *ETW Corp.*, 332 F.3d at 924. Federal courts interpreting Michigan law have held that Michigan recognizes a common law right of publicity that is synonymous with the common law right of right of privacy for appropriation. *See Carson v. Here's Johnny Portable Toilets, Inc.,* 698 F.2d 831, 835 (6th Cir. 1983) (Sixth Circuit held that appropriation of one's name or likeness for the defendant's advantage has become known as the "right of publicity."); *see also, Rufin-Steinback v. DePasse*, 267 F.3d 457, 461 (6th Cir. 2001) (applying Michigan law, the right of publicity is defined as "an appropriation of one's name or likeness for the defendant's advantage" and, "[t]he majority of cases which discuss the right of publicity, including *Carson* from this circuit, focus on the pecuniary interest in one's identity.") To maintain an action for misappropriation under Michigan law, similar to a claim of false endorsement under the Lanham Act, a plaintiff must demonstrate a pecuniary interest in their likeness to properly demonstrate that the defendant derived a benefit from the appropriation. *Parks*, 329 F.3d at 460 (a claim for misappropriation of one's likeness requires a plaintiff to prove that "she has a pecuniary interest in her identity.").

Here, despite extensive briefing in the state court action, Plaintiff was unable to establish that she *any* value in her image, let alone that she is a celebrity or public figure. Plaintiff is precluded by the doctrine of *res judicata* from re-litigating that determination in this case.

Accordingly, this Court must adopt the finding of the state trial court and find that Plaintiff does not have a protectible interest in her image such that Phenomenon's Motion for Summary Judgment should be granted and Plaintiff's Complaint should be dismissed.

2. Phenomenon's Use of Plaintiff's Image Did Not Create a False Origin Designation and Did Not Mislead as to the Source of the Work

a) Because Plaintiff Consented to the Use of Her Image in Association with Phenomenon, Plaintiff Cannot Establish a *Prima Facie* Case of False Origin

In order to prevail on a false origin claim under § 43(a) of the Lanham Act, a celebrity must show that use of his or her image is likely to cause confusion among consumers as to a false affiliation, connection, or association between the celebrity and the defendant's goods or services or falsely mislead as to the celebrity's participation in the origin, sponsorship, or approval of the defendant's goods or services. *Parks,* 329 F.3d at 446. Confusion occurs when consumers believe a misleading or false affiliation between the celebrity and the product. *Id.* Simply put, there must be a showing that there is no actual affiliation between the celebrity's image and defendant's goods or services that results in an actual deception. False endorsement under the Lanham Act thus "occurs when a celebrity's identity is connected with a product or service in such a way that consumers are likely to be misled about the celebrity's sponsorship or approval of the product or service." *ETW Corp.,* 332 F.3d at 925-926 (emphasis added).

In the subject action, Plaintiff's Complaint asserts that: 1) she "has not entered into a contract" with Phenomenon to "distribute, publish, or market her image in any way including posting aforementioned photographs on Internet websites"; and 2) she "does not, and has not, ever endorsed, sponsored, or associated herself with any entity, publication, organization or product." *See* Ex. 11, Complaint at ¶¶ 7, 10. Yet, Plaintiff's own testimony reveals that such claims are untrue. Plaintiff's own testimony reveals that she not only consented to be affiliated with Phenomenon, she sought Phenomenon out to take her pictures, she then entered into an express contract with Phenomenon, and ultimately consented to her image being displayed on Phenomenon's Eyecandy website. *See* Ex. 2, Arnold Affidavit, ¶ 4.

Both the ATA and Eyecandy websites exclusively exhibit Phenomenon's photography and are directly related to promoting Phenomenon's photography services. Further, the image of Plaintiff displayed in Don Diva was prefaced by a reference to Phenomenon. As such, a viewer of Plaintiff's images on the ATA or EyeCandy websites, or in the Don Diva magazine, would be on notice that the photography displayed is attributable to Phenomenon. To the extent that Plaintiff maintains that the appearance of her images on the ATA website is an endorsement, the only entity that Plaintiff could be endorsing is Phenomenon, with whom she admittedly contracted for photography services.[4] As Plaintiff has expressly acknowledged that she willingly agreed to be associated with Phenomenon pursuant to an express contract, and she allowed Phenomenon to utilize her image, there can be no false association or endorsement to support a claim under the Lanham Act as a matter of law. Accordingly, Phenomenon's Motion for Summary Judgment should be granted and Plaintiff's Complaint should be dismissed.

b) Phenomenon's Use of Plaintiff's Image is Subject To First Amendment Protections and the Use of Plaintiff's Image Does Not Mislead Consumers as to the Source of the Work

When there is a colorable claim that the use of the celebrity's image is protected by the First Amendment, the Sixth Circuit (as well as the Second and Ninth Circuits) has found that the "likelihood of confusion test" is not appropriate because it fails to adequately consider the interests protected by the First Amendment. *ETW Corp.*, 332 F.3d at 926; *see also Rogers v. Grimaldi,* 875 F.2d 994, (2nd Cir. 1989) (The Second Circuit concluded that "[b]ecause overextension of Lanham Act restrictions in the area of titles might intrude on First Amendment values, we must construe the Act narrowly to avoid such a conflict"); and *Mattel, Inc. v. MCA Records, Inc.,* 296 F.3d 894 (9th Cir.2002). When freedom of expression and/or free speech is evoked, "the Lanham Act should be applied to artistic works only where the public interest in avoiding confusion outweighs the public interest in free expression. [T]he public interest in free expression should prevail if the use of the celebrity's image has artistic relevance, unless it is used in such a way that it explicitly misleads as to the source of the work." *Id.* at 928; *citing Parks*, 329 F.3d at 451-52 (emphasis added). Accordingly, the initial inquiry is whether the medium in which Plaintiff's image appears constitutes artistic expression subject to the First Amendment. Once it is established that First Amendment protections apply, then in order to maintain a claim under the Lanham Act, Plaintiff must show: 1) that the use of her image, as a celebrity, has no artistic relevance; and 2) her image is used in such a way that it explicitly misleads as to the source of the work.

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[4] Plaintiff has no actionable claim under § 43(a) of the Lanham Act with respect to the use of the underlying photographs themselves because such claim is preempted by the Copyright Act. The photographs at issue are a medium subject to copyright. Plaintiff may therefore only allege a violation of the Lanham Act based on the use of Plaintiff's image. To avoid preemption, Plaintiff must state a claim of invasion distinct from copyright protections. *Landham*, 227 F.3d at 623.

(1) Phenomenon's Use of Plaintiff's Image Constitutes Artistic Expression Subject to the Protections of the First Amendment

The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 569 (1995) ("[T]he Constitution looks beyond written or spoken words as mediums of expression."); *Kaplan v. California,* 413 U.S. 115, 119-120 (1973) ("[P]ictures, films, paintings, drawings, and engravings have First Amendment protection[.]"); *Bery v. City of New York*, 97 F.3d 689, 695 (2nd Cir.1996)("[V]isual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection."). Similarly, speech is protected even though it is carried in a form that is sold for profit. *Time, Inc. v. Hill,* 385 U.S. 374, 397 (1967) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment"); *Comedy III Productions, Inc. v. Gary Saderup, Inc.,* 25 Cal. 4th 387, 394 (2001) ("portraits were entitled to First Amendment protection because they were "expressive works and not an advertisement or endorsement of a product.")

When commercial aspects of speech are "inextricably entwined" with expressive elements, they cannot be separated out "from the fully protected whole." *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1185 (9th Cir. 2001). The fact that expressive materials are displayed to promote the sale of future services does not diminish the degree of protection to which they are entitled under the First Amendment. Indeed, even if there is a commercial element to a protected expression, the slight risk that the use of a celebrity's name, image or likeness might implicitly suggest endorsement or sponsorship to some people is outweighed by the danger of restricting artistic expression, such that the Lanham Act is not applicable to protected expressions. *ETW Corp.*, 332 F.3d at 937 (Sixth Circuit held that survey evidence that some members of the public would draw the incorrect inference that a celebrity had some connection with a painting, not engendered by any explicit indication on the face of the print, is so outweighed by the interest in artistic expression as to preclude application of the Lanham Act); *see also Rogers*, 875 F.2d at 998 (artistic works protected by the First Amendment are often of a "hybrid nature, combining artistic expression and commercial promotion.")

Here, Plaintiff's image is used within photographs taken by Phenomenon. Both named Defendants, Tori Treadwell and Anthony Thomas, are artists specializing in photography. Moreover, the websites at issue, which they own and operate, exhibit their photography for the purpose of building their collective reputations and work portfolios. The website at issue does not operate for the purpose of selling the photographs on display, nor is Phenomenon a modeling agency. While Phenomenon's photography may not be appealing to everyone, it is clear that their photographs constitute artistic expression. To the extent such photographs have a commercial element for the promotion of Phenomenon's work, such commercial uses are "inextricably entwined" with expressive elements and cannot be separated out from the fully protected whole. The photographs at issue are thus not commercial speech and do not constitute a commercial transaction. Accordingly, each of the photographs at issue, in which Plaintiff's image appears, are entitled to protection under the First Amendment.

(2) Phenomenon's Use of Plaintiff's Image Does Not Mislead Consumers as to the Source of the Work

Because the photographs at issue are works of artistic expression within the purview of the First Amendment, § 43(a) of the Lanham Act must be narrowly construed. *Rogers,* 875 F.2d at 998. A claim for false origin or false endorsement under § 43(a) fails under *Rogers* unless the plaintiff demonstrates that: 1) the use of the celebrity's image has no artistic relevance; or 2) the celebrity's image was used in such a way that it explicitly misleads as to the source of the work. *ETW Corp.,* 332 F.3d at 928; and *Rogers,* 875 F.2d at 999. The Sixth Circuit has held that First Amendment protections are applicable to uses of a celebrity's image within an artistic work. *ETW Corp.*, 332 F.3d at fn. 11; *see also Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Group, Inc.,* 886 F.2d 490 (2nd Cir. 1989) (Second Circuit held that the *Rogers* test is not limited to literary titles but is generally applicable to Lanham Act claims against any works of artistic expression.) Accordingly, the First Amendment protects artistic works, such as photography, unless the use of the plaintiff's identity "is 'wholly unrelated' to the content of the work or was 'simply a disguised commercial advertisement for the sale of goods.' " *Parks,* 329 F.3d at 461.

Notwithstanding Plaintiff's lack of celebrity status as discussed above, Phenomenon's use of Plaintiff's image is nonetheless clearly related to the content of its work. Simply put, Plaintiff is the subject of the photograph and the manner and nature of the photograph is Phenomenon's artistic expression. Plaintiff's image is directly related to the expression in the photograph. Further, Plaintiff's image is not a disguised commercial endorsement or advertisement for the sale of goods. The only commercial aspect of the photographs exhibited on Phenomenon's website and within the publication of Plaintiff's image in Don Diva was the promotion of Phenomenon's artistic talents. Phenomenon is not a modeling agency and does not have exclusive modeling contracts with the persons appearing in their photographs. Clearly, Phenomenon must exhibit their photographs in order to showcase their artistic works and promote their artistic talents as photographers.

Similarly, with respect to Plaintiff's image appearing in Don Diva magazine, Plaintiff is unable to demonstrate any explicit indication on the face of the picture that misleads the public. The photo pictorial was preceded by "Photography by: Tori Treadwell and Anthony Thomas for Phenomenon Productions." *See* Ex. 3, Pictorial Photographs. As the photographers that took Plaintiff's photographs were affiliated with Phenomenon, Plaintiff willingly posed for the photographs, and consented to her image being associated with Phenomenon, Plaintiff's image was not used in such a way that explicitly misleads the public as to the source of the work. Indeed, the source of the work was accurately portrayed. Furthermore, there was no explicit writing on the photograph itself that would mislead the public that Plaintiff in someway endorsed Don Diva or that Don Diva was the source of the work.

Based upon Plaintiff's own testimony, Plaintiff was only able to identify two people, her own sister and an alleged customer at the strip club in which she is employed, that drew the alleged incorrect reference that Plaintiff was associated with Don Diva or the ATA website. Plaintiff has also failed to allege that any misunderstanding was due to an explicitly misleading statement. This slight risk of misunderstanding, while not engendered by any explicit indication on the face of the print, is outweighed by the interest in artistic expression as to preclude application of the Act. Accordingly, Phenomenon's Motion for Summary Judgment should be granted and Plaintiff's Complaint should be dismissed.

IV. CONCLUSION

Based on the undisputed facts, it is clear that Phenomenon Productions is entitled to Summary Disposition of this action. Despite lengthy discovery, Plaintiff has not presented sufficient evidence to maintain an action under the Lanham Act and is not entitled to rely upon their mere unsupported allegations. Defendants respectfully request this Court to summarily dismiss this action and award cost for litigation of this frivolous claim.

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DATED: October 14, 2008

CERTIFICATE OF SERVICE

I certify that on October 14, 2008, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all parties of record.

/s/ Dustin A. Lane